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**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF WASHINGTON**

In Re:

Case No. 18-03197-11

**GIGA WATT INC.,**

Debtor in Possession.

**DEBTOR IN POSSESSION'S  
EMERGENCY MOTION FOR  
INTERIM AND FINAL ORDERS  
AUTHORIZING DEBTOR IN  
POSSESSION TO (A) INCUR  
POSTPETITION DEBT ON AN  
EMERGENCY BASIS PENDING A  
FINAL HEARING, AND (B)  
PROVIDE SECURITY AND OTHER  
RELATED RELIEF**

Giga Watt, Inc., as Debtor and Debtor in Possession (the "**Debtor**"), by and through its undersigned counsel, hereby moves (the "**Motion**") the Court for entry of interim and final orders:

- (a) authorizing the Debtor to obtain secured, super-priority post-petition financing (the "**DIP Credit Facility**") consisting of \$500,000.00, with the sum of \$400,000 being available to the Debtor on an interim basis, subject to the terms and conditions set forth herein and in that certain Debtor in Possession

DEBTOR IN POSSESSION'S EMERGENCY MOTION - 1

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Credit Facility Term Sheet attached hereto as **Exhibit A** (as may be amended, supplemented, restated or otherwise modified from time to time, only consistent with the terms of this Interim Order (**Exhibit B**), the “**DIP Agreement**”)<sup>1</sup> by and among the Debtor and High Five Capital, LLC (the “**DIP Lender**”) and the financial institutions or other entities from time to time parties thereto, each as a DIP Lender, all as more fully set forth in the Interim DIP order.

- (b) authorizing the Debtor to execute and deliver the DIP Agreement and other related loan documents, including the Credit Agreement consistent therewith (collectively, with all documents comprising the DIP Credit Facility, the “**Financing Documents**”) and to perform such other acts as may be necessary or desirable in connection with the Financing Documents and pursuant to the provisions of the Interim Order;
- (c) authorizing the Debtor to grant DIP Lender allowed super-priority administrative expense claims in this Chapter 11 case and any successor case for the DIP Credit Facility and all obligations owing thereunder and under the Financing Documents.
- (d) authorizing the Debtor to grant the DIP Lender, automatically perfected security interests in and liens on all of the DIP Collateral (as defined herein) including, without limitation:
  - (1) All of Borrower’s assets and all proceeds and products of the foregoing, with priority over all existing liens including that of Giga Plex, LLC and Mechanic’s liens on Borrower’s assets; (2) proceeds of any and all claims, causes of action, and rights of Borrower arising under Bankruptcy Code sections 542-553 (other than Section 549)
- (e) authorizing the accrual of all fees and expenses payable to the DIP Lender under the Financing Documents;
- (f) vacating and modifying the automatic stay pursuant to Section 363 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of the Interim Order and the Financing Documents;

<sup>1</sup> Following entry of the Interim Order, the Debtor intends to work with the DIP Lender and its counsel to negotiate a DIP Credit Agreement (the “Credit Agreement”) that will be annexed to the form of the proposed Final Order.

- 1
- 2 (g) effective upon entry of a final order approving the relief requested herein (the
- 3 **"Final Order"**), waiving the Debtor's ability to surcharge against the DIP
- 4 Collateral pursuant to Section 506(c) of the Bankruptcy Code;
- 5
- 6 (h) effective upon entry of the Final Order, granting liens to the DIP Lender on
- 7 the claims and proceeds of the Debtor's claims and causes of action arising
- 8 under Sections 544, 547, 548, 549, 550 and 553 of the Bankruptcy Code to
- 9 secure the DIP Loan Outstandings;
- 10
- 11 (i) scheduling a final hearing (the **"Final Hearing"**) to consider entry of the
- 12 Final Order, and in connection therewith, giving and prescribing the manner
- 13 of notice of the Final Hearing on this Motion; and
- 14
- 15 (j) granting the Debtor such other and further relief as is just and proper.

## 16 JURISDICTION AND VENUE

17 1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§

18 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Debtor

19 consents to the entry of a final order by the Court in connection with this Motion to the

20 extent that it is later determined that the Court, absent consent of the parties, cannot enter

21 final orders or judgments consistent with Article III of the United States Constitution.

22 Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

23 2. The statutory bases for the relief requested herein are Sections 105, 361,

24 362, 363 and 364 of Title 11 of the United States Code (the **"Bankruptcy Code"**), Rules

202, 401, 6003 and 9014 of the Federal Rules of Bankruptcy Procedure (the

**"Bankruptcy Rules"**).

## 25 PRELIMINARY STATEMENT

26 3. As discussed herein, the proceeds of the DIP Credit Facility will be used for

27 working capital and other general corporate purposes and pay for the Debtor's budgeted

28 administrative expenses incurred during the Chapter 11 Case. The loan is absolutely

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essential to maintain utility services and for the Debtor to generate revenue from the cryptocurrency market.

**BANKRUPTCY RULE 4001 AND LOCAL RULE 4001-2 CONCISE  
STATEMENTS AND HIGHLIGHTED PROVISIONS**

4. Pursuant to Bankruptcy Rules 4001(b) and (c), the Debtor submits the following concise statements of the relief requested and the material terms of the Interim Order and highlighted provisions:

<u>Required Disclosure</u>	<u>Description of Relief/Provisions</u>
DIP Borrower	Giga Watt, Inc. <i>See DIP Agreement at pg. 1</i>
DIP Lender	<i>See DIP Agreement at pg. 1</i>
DIP Credit Facility Amount	\$500,000.00, with the sum of \$400,000.00 being available on an interim basis. <i>See DIP Agreement at pg. 1</i>
Interest Rate	The DIP Credit Facility will bear PIK interest at a rate per annum equal to 20% provided that, upon exercise by the Borrower of the Extension Period, or an event of default, such rate per annum shall increase to 24% <i>See DIP Agreement at pg. 2</i>
Default Interest	The default rate will be the rate otherwise in effect plus 4%, payable on demand. <i>See DIP Agreement at pg. 1</i>
Fees	<i>Closing Fee:</i> \$10,000 payable to DIP Lender at closing which fee shall be deemed earned at closing.  <i>Plan of Reorganization Success Fees:</i> If a plan of reorganization is confirmed in respect of this Chapter 11 case then a fee in the amount of \$100,000 will be payable upon the date of confirmation of such plan.  <i>Section 363 Sale Success Fee:</i> If all or substantially

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	<p>all of the Debtor's assets are sold pursuant to Section 363 of the Bankruptcy Code, then a fee of \$100,000 shall be payable to the DIP Lender on the confirmation date or at the time of sale.</p> <p><i>See DIP Agreement at pp. 2</i></p>
Approved Budget	<p>The Borrower shall not pay any expenses other than those set forth in the Approved Budget. The Borrower shall be authorized to use the proceeds of the DIP Credit Facility only for payment of such items as are set forth in the Approved Budget and subject to the terms and conditions set forth in the Financing Documents. The Approved Budget shall be revised by the end of each month during the term of the Credit Facility, and which shall remain subject to the consent of the DIP Lender each month. The Approved Budget is subject to certain variances and variance reports, all of which are discussed in the DIP Agreement attached hereto.</p> <p>The Approved Budget is attached as <b>Exhibit C</b>.</p> <p><i>See DIP Agreement at pp. 3</i></p>
Use of DIP Credit Facility	<p>DIP Lender is providing the DIP Facilities to fund the required operations of the Debtor during the administration of the Debtor's Case. As a condition to the entry into the DIP Agreement and the extension of credit under the DIP Credit Facility, the DIP Lender requires, and the Debtor has agreed, that proceeds of the DIP Credit Facility shall be used, in each case in a manner consistent with the terms and conditions of the Financing Documents, this Interim Order and the Budget (defined below and as the same may be modified from time to time) solely for (1) working capital and other general corporate purposes, (2) permitted payment of costs of administration of the Case (subject to the</p>

	limitations of the Carve Out defined below), (3) payment of fees and expenses due under the DIP Credit Facility, and as approved by the Court.
Termination Date of DIP	The earliest of: (a) June 30, 2019, <u>provided, however</u> , that the Borrower will have the right to extend such date to no later than September 30, 2019 by exercising one (1) three-month extension period (the “ <b>Extension Period</b> ”); or (c) confirmation of the Plan (as defined below) (the “ <b>Maturity Date</b> ”). For purposes hereof, the “ <b>Plan</b> ” shall mean a plan of reorganization of the Borrower, the terms and conditions of which are acceptable to the DIP Lender and its counsel.
Security to DIP Lender	DIP Lender is hereby granted continuing, valid, binding, enforceable, non-avoidable and automatically and properly perfected security interests in and liens on the “ <b>DIP Collateral</b> ”:  The DIP Liens securing the DIP Loan Outstandings shall be junior in payment and priority to the Carve Out defined below
DIP Super-priority Claims	Upon entry of the Interim Order, the DIP Lender is hereby granted, pursuant to Section 364(c)(1) of the Bankruptcy Code, an allowed super-priority administrative expense claim in each of the Case and any Successor Case (collectively, the “ <b>DIP Super-priority Claims</b> ”) for all DIP Loan Outstandings. The DIP Super-priority Claims shall be subordinate in payment and priority only to the Carve Out, and shall (a) otherwise have priority over any and all administrative expenses and unsecured claims against the Debtor or its estate in the Case and any Successor Case, at any time existing or arising, of any kind or nature whatsoever, including, without limitation, administrative expenses of the kinds specified in or

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	ordered pursuant to Sections 105, 326, 328, 330, 331, 365, 503(a), 503(b), 506(c), 507(a), 507(b) (except as set forth herein), 546(c), 546(d), 726 (to the extent permitted by law), 1113 and 1114 of the Bankruptcy Code, and any other provision of the Bankruptcy Code, except as set forth herein, and (b) at all times be senior to the rights of the Debtor and its estate, and any successor trustee or other estate representative to the extent permitted by law. In addition, upon entry of a Final Order, the DIP Super-priority Claims shall extend to (i) commercial tort claims, or (ii) any avoidance actions or claims arising under Chapter 5 of the Bankruptcy Code, or any of the proceeds of (i) and (ii).
Adequate Protection to Prepetition Lenders	N/A.  See Interim Order at §7.
Carve Out	<b>“Carve Out”</b> shall encompass the following expenses: (i) allowed fees, and reimbursement for disbursements of professionals retained by the Debtor (the <b>“Debtor’s Professional Fee Payments”</b> ) accrued in accordance with the Budget in an aggregate amount for all the Debtor’s Professional Fee Payments not to exceed \$50,000; (ii) quarterly fees pursuant to 28 U.S.C. § 1930(a)(6); and (iii) fees payable to a Chapter 7 trustee in an aggregate amount not to exceed \$10,000 and (b) without reducing the Carve Out Amount, all Debtor’s Professional Fee Payments in accordance with the Budget, and payable under Sections 330 and 331 of the Bankruptcy Code, to the extent incurred prior to such Triggering Event.
Indemnification	The Debtor shall indemnify and hold harmless the DIP Lender and their affiliates against any and all

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	liabilities arising out of or related to the transaction. Borrower's obligations shall survive termination of this term sheet.
Covenants	Usual and customary negative covenants for financings of this kind and subject to customary exceptions for facilities of this type.  See DIP Agreement at 4.

5. As discussed in greater detail below, the DIP Lender would not provide the DIP Credit Facility without the inclusion of the provisions listed above, each of which was heavily negotiated among the parties. Moreover, given that the provision of the DIP Credit Facility will enable the Debtor to administer this Chapter 11 case for the interest of all stakeholders, these provisions will not unduly harm the Debtor's estate and are justified under the circumstances for the reasons set forth below. Finally, the Debtor has determined in its sound business judgment that agreeing to such provisions was appropriate under the circumstances of this case to afford the Debtor immediate and much needed liquidity on the most competitive terms available to the Debtor.

## **BACKGROUND**

### **BASIS FOR RELIEF**

6. For the following reasons, the Debtor respectfully submits that it has satisfied the standards applicable for the Court's approval of the DIP Credit Facility and entry of the Interim Order.

#### **I. The Debtor Satisfies the Requirements for Entering into the DIP Credit Facility Under Section 364(c) of the Bankruptcy Code.**

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1  
2 7. The Debtor proposes to obtain the DIP Credit Facility by providing to the  
3 DIP Lender security interests and liens as set forth above pursuant to Section 364(c) of  
4 the Bankruptcy Code. The statutory requirement for obtaining postpetition credit under  
5 Section 364(c) is a finding, made after notice and hearing, that a debtor is “unable to  
6 obtain unsecured credit allowable under Section 503(b)(1) of [the Bankruptcy Code] ....”  
7 11 U.S.C. Section 364(c).

8 8. Section 364(c) financing is appropriate when the trustee or debtor-in-  
9 possession is unable to obtain unsecured credit allowable as an administrative  
10 claim.

11 9. Courts have articulated a three-part test to determine whether a debtor is  
12 entitled to financing under Section 364(c) of the Bankruptcy Code. Specifically, courts  
13 look to whether:

- 14 (a) the debtor is unable to obtain unsecured credit under Section 364(b),  
15 *i.e.*, by allowing a lender only an administrative claim;
- 16 (b) the credit transaction is necessary to preserve the assets of the estate;  
17 and
- 18 (c) the terms of the transaction are fair, reasonable and adequate, given the  
19 circumstances of the debtor-borrower and the proposed lender.

20 *In re Aqua Assocs.*, 123 B. R. 192, 195-96 (Bankr. E.D. Pa. 1991). For the reasons  
21 discussed below, the Debtor satisfies the standards required to obtain postpetition  
22 financing under Section 364(c) of the Bankruptcy Code.

23 **A. The Debtor Does Not Have an Alternative to the DIP Credit**  
24 **Facility.**

10. The required showing under Section 364 of the Bankruptcy Code that other  
credit was not available to the Debtor is not rigorous. In these circumstances, “[t]he  
statute imposes no duty to seek credit from every possible lender before concluding that

1 such credit is unavailable.” *Bray v. Shenandoah Fed. Savs & Loan Ass’n (In re*  
2 *Snowshoe Co.)*, 789 F.2d 1085, 1088 (4<sup>th</sup> Cir. 1986) Indeed, a debtor need only  
3 demonstrate by a good faith effort that credit was not available without the protections  
4 afforded to potential lenders by Section 364(c) of the Bankruptcy Code. *In re Antico*  
5 *Mfg. Co.*, 31 B.R. 103, 105 (Bankr. E.D.N.Y. 1983). Moreover, whereas here, there are  
6 few lenders likely to be able and willing to extend the necessary credit to a debtor, “it  
7 would be unrealistic and unnecessary to require [the debtor] to conduct ... an exhaustive  
8 search for financing.” *In re Sky Valley, Inc.*, 100 B. R. 107, 113 (Bankr. H.D. Ga. 1988).

9 11. After assessing its financial condition and reaching out to other potential  
10 financing parties, the Debtor determined that adequate financing on an unsecured or  
11 junior priority basis to the existing prepetition liens was simply not available. As a result,  
12 the DIP Lender is the only party that offered to provide the Debtor with postpetition  
13 financing and was only willing to lend to the Debtor on the terms set forth in the  
14 Financing Documents and the Interim Order. For these reasons, the Debtor has  
15 determined that, under the circumstances, the DIP Credit Facility is the best postpetition  
16 financing option available to it and its estate and is a prudent exercise of the Debtor’s  
17 business judgment. *See, e.g., In re Ames Dept. Stores*, 115 B.R. 34, 38 (Bankr. S.D.N.Y.  
18 1990)(with respect to postpetition credit, courts “permit debtors in possession to exercise  
19 their basic business judgment consistent with their fiduciary duties”).

20 **B. The DIP Credit Facility is Necessary to Preserve the Assets of the**  
21 **Debtor’s Estate.**

22 12. It is imperative that the Debtor promptly obtain access to financing to  
23 preserve and protect the value of its estate. Access to substantial credit is necessary to  
24 meet the day-to-day costs associated with administering this Chapter 11 Case, including  
funding for employee wages and other costs necessary for preservation of the Debtor’s

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1 assets. Immediate access to sufficient cash is therefore critical to the Debtor. In the  
2 absence of immediate liquidity, the Debtor's employees and servicers may refuse to  
3 continue providing services to the Debtor, rendering the Debtor unable to administer this  
4 Chapter 11 Case. Indeed, loss of confidence among employees and other interested  
5 parties in the Debtor's ability to access credit at this crucial time would have a material  
6 adverse impact on the Debtor and its estate. Accordingly, the DIP Credit Facility is  
7 necessary to maximize the value of the Debtor's estate, pending prosecution of the Trade  
8 Case and, ultimately, confirmation of a plan of reorganization. *See Burtch v. Ganz (In re*  
9 *Mushroom Transp. Co.)* 382 F.3d 325, 339 (3d Cir. 2004)(debtors-in-possession have a  
10 duty to maximize their estates' assets).

11 **C. The Terms of the DIP Credit Facility are Fair, Reasonable and**  
12 **Appropriate Under the Circumstances.**

13 13. The Debtor's request to enter into the DIP Credit Facility reflects the  
14 exercise of the Debtor's sound and prudent business judgment. As described above, the  
15 Debtor was not able to obtain alternative financing on an unsecured basis, nor were they  
16 able to obtain any financing on terms as favorable to them as the terms negotiated with  
17 the DIP Lender.

18 14. Accordingly, the Debtor submits that the terms and conditions of the  
19 Financing Documents and the Interim Order are fair and reasonable and were negotiated  
20 by the Parties in good faith and at arm's-length.

21 **II. The Debtor Has Exercised Sound Business Judgment in Determining that the**  
22 **DIP Credit Facility is Necessary.**

23 15. As described above, after appropriate investigation and analysis, and given  
24 the exigencies of the circumstances, the Debtor has concluded that alternative credit of

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1 the type and in the amount required by the Debtor is not available on an unsecured basis.  
2 Bankruptcy courts routinely defer to a debtor's business judgment on most business  
3 decisions, including the decision to borrow money, unless such decision fails the arbitrary  
4 and capricious standard. *See Trans World Airlines, Inc. v. Travelers Intl AG (In re Trans*  
5 *World Airlines, Inc.)*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that approval of  
6 interim loan, receivables facility, and asset-based facility "reflect[ed] sound and prudent  
7 business judgment ...[was] reasonable under the circumstances and in the best interest of  
8 [the debtor] and its creditors.").

9 16. The Debtor has exercised sound business judgment in determining that the  
10 DIP Credit Facility is not only appropriate, but that it is absolutely necessary. Without  
11 the liquidity provided by the DIP Credit Facility, the Debtor would be unable to pay  
12 employees and other constituencies that are essential to preserving the going concern  
13 value of this estate.

### 14 **III. Request for Modification of the Automatic Stay for the DIP Lender.**

15 17. Section 362 of the Bankruptcy Code provides for an automatic stay upon the  
16 filing of a bankruptcy petition. The proposed Financing Documents contemplate a  
17 modification of the automatic stay, to the extent applicable, to permit the DIP Lender to  
18 exercise of all of its rights and remedies provided for in the Financing Documents upon  
19 the occurrence and during the continuation of an Event of Default (as defined in the DIP  
20 Agreement), provided that the DIP Lender shall not be entitled to exercise any remedies  
21 with respect to the DIP Collateral until five (5) business days after the Termination Date  
22 (as defined in the Interim Order).

### 23 **IV. Request for Immediate Interim Relief.**

24

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1  
2 18. Bankruptcy Rules 4001(b) and 4001(c) provide that a final hearing on a  
3 motion to obtain credit may not be commenced earlier than fourteen (14) days after the  
4 service of such motion. *See* Bankruptcy Rules 4001(b)(2), 4001(c)(2). Upon request,  
5 however, the Court is empowered to conduct a preliminary expedited hearing on the  
6 motion and to authorize the obtaining and use of credit to the extent necessary to avoid  
7 immediate and irreparable harm to a debtor's estate pending a final hearing. In  
8 examining requests for interim relief under this rule, courts apply the same business  
9 judgment standard applicable to other business decisions. *See, e.g., In re Simasko Prod.*  
10 *Co.*, 47 B.R. 444, 449 (Bankr. D. Colo. 1985).

11 19. Pending the Final Hearing, the Debtor will be permitted to use up to  
12 \$400,000 of the DIP Credit Facility Commitment for, among other things, payment of  
13 employee wages, rent and other working capital needs. It is essential that the Debtor  
14 immediately have the ability to pay for postpetition operating expenses to preserve and  
15 enhance the going concern value of the Debtor's estate.

16 20. Absent immediate use of the DIP Credit Facility, the Debtor will be unable  
17 to pay ongoing operational expenses and will not be able to continue to make payments  
18 to key constituencies, such as its employees, who are integral to ensuring a smooth  
19 transition into Chapter 11. Consequently, if interim relief is not obtained, the Debtor's  
20 efforts in this case will be jeopardized immediately and irreparably harmed to the  
21 detriment of the Debtor's estate, its creditors, and other parties in interest.

22 **V. The Financing Documents Should be Accorded the Benefits of Section 364 of**  
23 **the Bankruptcy Code.**

24 21. Because the Financing Documents are fair and reasonable and have been  
negotiated in good faith and at arm's-length, and no consideration is being provided to

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1 any party for obligations arising under the DIP Agreement or the other Financing  
2 Documents, other than as disclosed therein, the Debtor requests that the Financing  
3 Documents be accorded the benefits of Section 364(e) of the Bankruptcy Code.

4  
5 **VI. The Payment of Fees and Other Costs are Reasonable and Appropriate.**

6 22. As described above, the Debtor has agreed, subject to Bankruptcy Court  
7 approval, to accrue certain fees to the DIP Lender in connection with the DIP Credit  
8 Facility. The Debtor believes that that proposed fees are reasonable and appropriate and  
9 give the Debtor access to financing on the most favorable terms on which the DIP Lender  
10 would agree to make the DIP Credit Facility available. The Debtor considered these fees  
11 when determining in the exercise of its sound business judgment that the DIP Credit  
12 Facility constitutes the best terms on which the Debtor could obtain the postpetition  
financing necessary to administer this case.

13  
14 **The Requirements of Bankruptcy Rule 6003(b) are Satisfied**

15 23. Bankruptcy Rule 6003 provides that the relief requested in the Motion may  
16 be granted if the “relief is necessary to avoid immediate and irreparable harm ....” See  
17 Fed. R. Bankr. P. 6003. As described herein, the Debtor’s estate will suffer immediate  
18 and irreparable harm if it is not granted immediate use of the DIP Credit Facility in order  
19 to pay ongoing operational expenses. Accordingly, the Debtor submits that the relief  
20 requested herein is necessary to avoid immediate and irreparable harm, and, therefore,  
Bankruptcy Rule 6003 is satisfied.

21 **Waiver of Bankruptcy Rule 6004(a) and 6004(h)**

22 24. To implement the foregoing successfully, the Debtor requests that the Court  
23 enter an order providing that notice of the relief requested herein satisfied Bankruptcy  
24 Rule 6004(a) and that the Debtor has established cause to exclude such relief from the

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1 14-day stay period under Bankruptcy Rule 6004(h).

2 **NOTICE**

3 25. Notice of this Motion and any order entered hereon will be served on all  
4 required parties. Based on the urgency of the circumstances surrounding this Motion and  
5 the nature of the relief requested herein, the Debtor respectfully submits that no further  
6 notice is required.

7 **NO PREVIOUS REQUEST**

8 26. No previous request for the relief sought herein has been made by the Debtor  
9 to this or any other court.

10 **WHEREFORE**, the Debtor respectfully requests that the Court:

- 11 (a) enter the Interim Order, granting the relief requested in this Motion on an  
interim basis;
- 12 (b) after the Final Hearing, enter the Final Order substantially in the form that  
13 shall be filed with the Court; and
- 14 (c) grant such other and further relief as may be just and proper.

15 DATED this 20th day of December, 2018.

16 WINSTON & CASHATT, LAWYERS

17 /s/ Timothy R. Fischer

18  
19 TIMOTHY R. FISCHER, WSBA No. 40075  
20 Attorneys for Debtor in Possession

21  
22  
23  
24 DEBTOR IN POSSESSION'S EMERGENCY MOTION - 15

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